Limitations on the right to freedom of testation

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Part 2

In the previous article, I discussed two case studies involving discriminatory testamentary provisions. We now move on to the third example; the matter of *Curators, Emma Smith Educational Fund v University of KwaZulu-Natal 2010 (6) SA 518 (SCA) (Emma Smith Educational Fund*). The judgment was handed down by the Supreme Court of Appeal (SCA). It dealt with discriminatory testamentary provisions in a public charitable trust. Eligibility for the bursary was limited to European girls who were born of British South African or Dutch South African parents. It was further required that they must have been resident in Durban for a period of at least three years immediately preceding the grant.

An order was sought for the deletion of the discriminatory provisions from the trust deed based on s13 of the TPCA that allows the court to vary provisions in a trust instrument. The court held that the constitutional obligation to remove provisions that are in conflict with public policy takes precedence over freedom of testation. The court did not answer the question as to whether the Constitution can be applied directly to the law of succession (*King NO and Others v De Jager and Others* 2017 (4) All SA 57 (WCC)). It must be noted that the court placed considerable emphasis on the fact that the trust was a public charitable one which operated in the public sphere. It held that there can be no question that racially discriminatory testamentary dispositions in the public sphere will not pass constitutional muster. The court stated that testamentary dispositions in the private sphere would require a totally different approach.

The fourth case to look at is *In re: Heydenrych Testamentary Trust and Others* 2012 (4) SA 103 (WCC). Judgment was handed down by the Western Cape High Court. It dealt with discriminatory testamentary provisions in a number of public charitable trusts. It was argued that the trusts

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discriminated on the grounds of race, descent, and gender. An order was sought for the deletion of the discriminatory provisions from the trust deeds, on the basis of s13 of the TPCA. The court held that the provisions constituted unfair discrimination on the grounds of race and gender and were in conflict with the Constitution and the public interest. What makes this case different from the three previous cases is that it dealt with multiple charitable trusts. The issue in *Heydenrych Testamentary Trust* was quite similar to that of *Syfrets Trust Ltd*. The relief sought in *Heydenrych Testamentary Trust* was simply to widen the pool of prospective applicants for the bursaries. It was not to take away benefits from particular beneficiaries. It applied in the public sphere and for an indefinite period of time.

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The fifth case is *Harper and Others v Crawford NO and Others* 2017 (4) All SA 30 (WCC) (*Harper*). The judgment was handed down by the Western Cape High Court and dealt with discriminatory testamentary provisions in a private trust deed. It was argued that the trust discriminated on the basis of birth. An order was sought for the amendment of the trust deed to include the excluded adopted children in terms of s13 of the TPCA. The court noted that the relief sought was quite far reaching as it would infringe the right to freedom of testation and that relief granted in previous cases of this nature (the preceding four cases discussed) did nothing more than widen the pool of prospective applicants for bursaries. The relief granted did not take away benefits that were already conferred on specific beneficiaries nor did it confer benefits on other persons. It further noted that the relief granted in previous cases concerned public wills that concerned bursaries made available to applicants from the public. Public institutions were involved in administering the bursaries. The court stated that the public element of discrimination in such cases would lead to the right to equality taking preference over the right to freedom of testation. The court held that it did not have the competency to amend the trust deed, in the same way that it does not have the authority to amend the will of a testator or testatrix.

The sixth case to discuss is *King NO and Others v De Jager and Others* 2017 (4) All SA 57 (WCC) (*De Jager*). The judgment was handed down by the Western Cape High Court. It dealt with discriminatory testamentary provisions in a private will. It was argued that the will discriminated against certain persons on the ground of gender. An order was sought to amend the will in order to include the excluded persons based on the common law which prohibits bequests that are contrary to public policy, and on direct application of the equality provisions found in the Constitution. The court noted that there were a number of problems with granting the relief sought. It would mean that the court would be the final arbiter in the choice of beneficiaries in testamentary dispositions of a non-public nature, and would lead to situations where the last wishes of a testator or testatrix are second-guessed by a court, by including excluded persons. This is quite different to 'amending the terms' of a charitable trust as discussed in the first five cases. Those cases involved 'determining altered terms for how property that has been bequeathed should be administered' by the trustees. This is quite different from determining whether property should be bequeathed to a particular person. The application in *De Jager* was dismissed and the will was not amended by the court.

The discussion in Parts 1 and 2 has clearly shown that the right to freedom of testation has been limited in South Africa, in terms of both the common law and constitutional provisions. The investigation shows that discriminatory provisions that apply in the public sphere are more open to scrutiny than those in the private sphere. It recommended that these cases be kept in mind when drafting last wills and testaments. ◆

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